IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO.148 OF 2005

SANTA MONICA CONVENT, alias
Convento de Santa Monica, alias
Mosteiro de Santa Monica of
Archdiocese of Goa and Daman,
having its office at Bishops
Palace, Altinho, Panaji,
represented by the Archbishop
of Archdiocese Rt.Rev. Filipe
Neri Ferrao, through his
lawful attorney,
Rev. Fr. Arlino De Mello,
Major, of age, Priest,
residing at Bishop's Palace,
Altinho, Panaji, Goa. .... Appellant

- Versus -

1. Shri Anant Vithal Kubal,
   Betim, Walkeshwar,
   Bardez, Goa.

2. The Seminary of Our Lady,
   Saligao-Pilerne, alias
   Seminary of Saligao,
   having its office at Saligao
   Pilerne Plateau, Saligao,
   Bardez, Goa, through its
   Rector, r/at the Seminary,
   Post Saligao, Goa. .... Respondents

Shri D.P. Bhise for the Appellant.

Shri J.P. Mulgaonkar for the Respondent No.1.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: FEBRUARY 24, 2006

ORAL JUDGMENT:

1. Heard. Admit. By consent, heard forthwith. The following substantial question of law arise for consideration in the matter:

> "When a suit is decreed ex parte solely on the ground that the affidavit evidence of the plaintiff had gone unchallenged and without analysing such evidence, whether the Appellate Court, in the appeal arising from such a decree, should while setting aside the same, remand the matter to the trial Court or proceed to decide the same finally?

2. The judgment and decree passed by the lower Appellate Court is sought to be challenged on the ground that the lower Appellate Court having found that the trial Court had decreed the suit solely on the basis of the affidavit evidence filed by the plaintiff, without even analysing such evidence in any manner and therefore being liable to be set aside, it could not have proceeded to consider the matter on merits but ought to have remanded the matter to the trial Court for being disposed of in accordance with the provisions of law. There is no serious contest by the respondents to the above proposition canvassed by the appellant.

3. The undisputed facts relevant for the decision are

that, the appellant filed a suit for injunction and also regarding the entries in the record of rights in

respect of the suit property. After service of the summons to the respondent, the suit proceeded ex parte and consequently the appellant filed the affidavit evidence in terms of the Order 18, Rule 4 of the Code of Civil Procedure. The trial Court then proceeded to dispose of the suit with the following observations in its judgment:

> "5. Affidavit in evidence is filed by Father Victor Rodrigues, on behalf of the plaintiff and in the capacity of constituted attorney of the plaintiff. Along with the affidavit various documents such as the matriz certificate, survey records, old as well as new and the survey plan etc. are exhibited. Father Victor has solemnly affirmed the case of the plaintiff and the defendants have taken no defence. It is therefore held that the plaintiff has established its case."

4. Apart from the para 5 quoted above, the trial Court did not bother to analyse the evidence produced

by the appellant to ascertain whether the plaintiff had made out the case for grant of relief asked for. Being aggrieved by the said decree, the respondent

filed the appeal. While allowing the appeal, the trial Court dismissed the suit. In fact, once it was revealed to the lower Appellate Court that the trial Court had decreed the suit without application of mind to the materials placed on record by the appellant, the appropriate procedure would have been to set aside the judgment and decree passed by the trial Court and to remand the matter to the trial Court. Undisputedly, there was no finding arrived at by the Court of original jurisdiction on the point of entitlement or disentitlement of the plaintiff to get a decree in the matter in relation to the dispute which was sought to be raised in the suit. Undisputedly, the lower Appellate Court proceeded to dismiss the suit merely observing that the suit is barred by the law of limitation.

5. Undoubtedly, the powers of the Appellate Court similar to that of the Court of original jurisdiction. The Section 107(1)(a) of the Code of Civil Procedure clearly empowers the Appellate Court to determine the case finally. At the same time, Clause (b) thereof empowers the Appellate Court to remand a case wherever occasion arises for such an order. At the same time,

Order 41 of the C.P.C. prescribes certain methodology for exercise of such powers by the Appellate Court.

6. The Order 41, Rules 23 and 24 of C.P.C. prescribe

relevant procedure to be followed while disposing an appeal. While Rule 23 speaks of remand, the Rule 24 deals with final disposal of the case on merits. Accordingly, the latter Rule provides that when the evidence on the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may after resettling the issue, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decision the appeal is preferred has pronounced wholly upon some ground other than that on which the Appellate Court proceeds. This rule, therefore, clearly empowers the Appellate Court to determine the case finally when the evidence on record is sufficient to pronounce the judgment on the controversy involved in the matter irrespective of the fact that the trial Court has dealt with such controversy or not. However, when the point in controversy is raised for the first time in the appeal without there being any adjudication thereof by the trial Court in respect of the right of the parties to the matter in dispute, can it be said that the evidence on record could be sufficient to decide such controversy finally by the Appellate Court? In a case

where the matter proceeds ex parte, the Court will have no opportunity to have before it the evidence of the plaintiff having been subjected to the cross-examination and to that extent the materials on record placed by the plaintiff cannot be said to be

sufficient to enable the Court to pronounce the judgment in each and every case of this type. Of course, if the point can be decided to be arising on the face of the pleadings of the parties, it may be a different case, with which we are not concerned in the case in hand. Perhaps when the issue is purely a question of law and can be decided solely on the basis of the pleadings of the parties, it may also be a different story.

7. In the case in hand, the lower Appellate Court has disposed of the suit solely on two grounds: firstly, that the trial Court has merely endorsed the affidavit evidence produced by the plaintiff without analysing its credibility and secondly, that the suit is barred by the law of limitation.

8. Once it is held that the judgment of the trial Court does not disclose any reasoning, it is obvious that there was no adjudication of rights of the plaintiff and the trial Court had accepted the story of the plaintiff without application of mind.

Therefore, it goes without saying that the trial Court has not at all considered even the point relating to the bar of limitation. Now, when the point of limitation is to be decided based on the evidence led by the party, and when the evidence on record is not complete in the absence of cross-examination of the

party who had filed the affidavit evidence, it goes without saying that the Appellate Court in exercise of powers under Order 41, Rule 24 cannot determine the case finally on the basis of such incomplete evidence.

9. It is a matter of record that the trial Court did not frame any issue as such to ascertain whether the appellant had made out a case for grant of decree or not. While doing the said exercise, it would have been necessary for the lower Appellate Court to deal with the issue regarding the bar of limitation also. However, on account of failure on the part of the respondents to contest the proceedings by filing the written statement, the trial Court seems to have proceeded without even framing the issue.

10. In fact, mere failure on the part of the defendants to file the written statement for contesting the suit filed by the plaintiff, that itself could not absolve the trial Court from its obligation arising under the provisions of Order 14 of

the C.P.C.. It is not merely because the defendant contests the suit that the Court is required to frame the issue. Undoubtedly, in case where there is no contest by filing the written statement, it may not be in the nature of the issue on account of the dispute being raised by the defendant. Nevertheless, it would be necessary for the Court to frame the points for

determination in order to ascertain whether the plaintiff has made out a case in relation to his claim in the plaint and further to enable the Court to arrive at appropriate finding in relation to such dispute sought to be raised by the plaintiff to enable the Court to decide about the nature of the relief to be granted to the plaintiff. Indeed, as rightly submitted by the learned Advocate for the respondents, the law on this point is settled by the Apex Court's decision in **Ramesh Chand Ardawatiya v. Anil Panjwani,** reported in (2003) 7 SCC 350. Once it was apparent to the lower Appellate Court that the trial Court had failed to comply with its obligation in that regard and had proceeded to dispose of the suit merely counter-signing the affidavit in evidence without application of mind, it was but necessary for the lower Appellate Court to set aside the said judgment and remand the matter with a specific direction to proceed from the stage of filing of the affidavit evidence by the plaintiff.

11. Needless to say that failure to file the written statement would not divest the defendant of his/her right to cross-examine the plaintiff in relation to the affidavit evidence produced by the plaintiff. Undoubtedly, the defendant will not be entitled to put forth his/her case in such a situation but the defendant would be entitled to challenge the

credibility of the evidence produced by the plaintiff and even to point out whether any particular evidence is admissible or non-admissible including the documentary evidence produced by the plaintiff. Undisputedly, no such exercise has been done in the case in hand. Being so, while setting aside the judgment of the trial Court, it was necessary to remand the matter to be proceeded with from the stage of filing of the affidavit evidence by the plaintiff.

12. For the reasons stated above, therefore, the appeal partly succeeds and while setting aside the impugned judgment, as far as it dismisses the suit on merits, the same is set aside to that extent and the matter is remanded to the trial Court to deal with the suit in accordance with the provisions of law from the stage of filing of the affidavit in evidence by the plaintiff, bearing in mind the observations hereinabove. The appeal is disposed of accordingly

with no order as to costs.

(R.M.S.Khandeparkar,J.)

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